

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 97-0609 ITC**

**Gross & Adjusted Gross Income Tax**

**For Tax Period: 1993 Through 1995**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Gross Income Tax**

**Authority:** IC 6-2.1-2-2; 45 I.A.C. 1-1-120; *Gross Income Tax Division v. Owens-Corning Fiberglass Corp.*, IN Supreme Court, 251 N.E.2d 818 (1969); *Indiana Dept. of S.R. v. Frank Purcell Walnut Lbr. Co.*, 282 N.E.2d 336 (1972)

Taxpayer protests the imposition of gross income tax on gross receipts from Indiana customers.

**II. Adjusted Gross Income Tax and Supplemental Net Income Tax**

Taxpayer protests the calculation of adjusted gross income tax and supplemental net income tax.

**III. Tax Administration – Penalty**

**Authority:** IC 6-8.1-10-2.1; Public Law 86-272

Taxpayer protests the imposition of a ten percent penalty.

**STATEMENT OF FACTS**

Taxpayer incorporated under the laws of Indiana in 1990. Taxpayer's commercial domicile is in the State of Ohio. Taxpayer solicits sales from Indiana customers with salespeople from Ohio. Taxpayer does not

have any Indiana resident employees. Orders from Indiana customers are approved, filled and shipped from taxpayer's facility in Ohio. Taxpayer has been included in a consolidated gross income tax return since 1990. Taxpayer did not file an adjusted gross income tax or a supplemental net income tax return during the assessment period. The Department's auditor assessed gross income tax, adjusted gross income tax, supplemental net income tax and penalties. Taxpayer protested the auditor's assessments. Additional relevant facts will be provided below, as necessary.

## **I. Gross Income Tax**

### **DISCUSSION**

Indiana Code section 6-2.1-2-2(a)(2) reads:

An income tax, known as the gross income tax, is imposed upon the receipt of:  
...the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

Taxpayer is incorporated in Indiana but is commercially domiciled in Ohio. Taxpayer does not employ any Indiana resident salespeople. Taxpayer argues the sales made to Indiana customers are not based on activities or businesses within Indiana. Taxpayer suggests the mere solicitation of orders from Indiana customers is incidental to the overall transactions giving rise to the gross income.

The auditor's assessment of gross income tax stems from Department Regulation 45 I.A.C. 1-1-120(2)(e) which provides taxable in-shipments include:

Sales made by an Indiana resident or corporation incorporated in Indiana, which sales originated from its out-of-state business branch, and where the goods were shipped directly to the buyer from an out-of-state location...

Taxpayer protests this assessment and claims sales made to Indiana customers were exempt as interstate commerce. Taxpayer cites *Gross Income Tax Division v. Owens-Corning Fiberglass Corp.*, 251 N.E.2d 818 (1969). In *Owens-Corning*, the Court required sufficient nexus between the tax and the taxpayer's business transactions within Indiana before gross income tax was applicable. Annual negotiations and periodic courtesy calls by in-state employees were not sufficient to require the tax. The Court went further to analogize *Owens-Corning* with, "the so-called 'drummer' cases. Those cases involve non-resident salesmen going into a state to solicit orders for goods which [sic] are to be manufactured and shipped from another state; the sole contact with the taxing state being the intrastate solicitation of orders." *Id.* at 827. The *Owens-Corning* Court held that since the transactions involved essentially interstate solicitation or orders the State could not tax the income. *Id.* at 828. The distinguishing factor in *Owens-Corning*, however, is that Owens-Corning was not an Indiana corporation. Owens-

Corning was incorporated elsewhere but had employees located in Indiana which gave rise to the tax dispute.

In *Indiana Dept. of S.R. v. Frank Purcell Walnut Lbr. Co.*, 282 N.E.2d 336 (1972), the court found taxable the gross receipts of an Indiana corporation doing business in Kansas when the receipts came from an Indiana customer. The court said “although the details of the sale ... were concluded in the state of Kansas, the sale was made by an Indiana corporation to an Indiana corporation with delivery in Indiana.” *Id.* at 341.

The *Purcell* case is easily analogized to the taxpayer here. Taxpayer is an Indiana corporation. Taxpayer claims only solicitation occurs in Indiana with order approval and shipping coming from Ohio. However, pursuant to *Purcell*, because taxpayer is an Indiana corporation and its receipts come from an Indiana customer the receipts are taxable for gross income. Also, there is no risk of double taxation in this case as the customers are located in Indiana. The Department finds the *Purcell* ruling and Department Regulation 45 I.A.C. 1-1-120(2)(e) on point and controlling.

### **FINDING**

Taxpayer’s protest is denied.

## **II. Adjusted Gross Income Tax and Supplemental Net Income Tax**

### **DISCUSSION**

Taxpayer concedes it never filed an adjusted gross income tax (AGIT) or supplemental net income tax (SNIT) return with the Department during the assessment period. Taxpayer argues this failure to file leaves the statute of limitations open for all years beginning with the year ended December 31, 1990 (the year of incorporation).

In conducting the audit, the auditor went back to tax years ended December 31, 1993 through 1995. Taxpayer reported federal taxable income for each of those years. However, for tax years ended December 31, 1990 through 1992 taxpayer reported federal net operating losses. Taxpayer argues the auditor failed to consider the loss carryforwards in determining the AGIT and SNIT for years 1993 through 1995.

Taxpayer claims it should be allowed to file AGIT and SNIT returns for tax years 1990 through 1992 which would establish the Indiana net operating losses. These losses could then be carried forward to offset income in years 1993 through 1995.

### **FINDING**

Taxpayer's protest is sustained pending audit verification. Taxpayer must file AGIT and SNIT returns for tax years 1990 through 1992 and then the assessments for tax years 1993 through 1995 will be recomputed.

### **III. Tax Administration – Penalty**

### **DISCUSSION**

Pursuant to Indiana Code 6-8.1-10-2.1, a ten percent penalty is applied to deficiencies in tax payments attributable to negligence. The Department shall waive the penalty if the taxpayer proves the failure was due to reasonable cause and not willful neglect.

Taxpayer contends it's failure was due to incorrect, yet reasonable, interpretations of the law and not negligence. Taxpayer claims it believed it was exempt from paying AGIT and SNIT pursuant to Public Law 86-272. However, PL 86-272 very clearly states the provision does not apply to "any corporation which is incorporated under the laws of such State." Taxpayer's claim that it misinterpreted PL 86-272 is not sufficient to show reasonable cause.

### **FINDING**

Taxpayer's protest is denied.